90-1365

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANK'S NURSERY & CRAFTS, INC.,
Petitioner,

v.

MARTHA DUNHAM AND PRESTON DUNHAM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the constitutional prohibition on prosecutors' racially discriminatory exercise of peremptory challenges in criminal cases, as elaborated in *Batson v. Kentucky*, 476 U.S. 79 (1986), applies to private litigants in civil cases.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Frank's Nursery & Crafts, Inc., petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is reported at 919 F.2d 1281. The magistrate's decision overruling respondents' objection to petitioner's peremptory strike (Pet. App. 44a) is unpublished.

JURISDICTION

The court of appeals entered judgment on December 12, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] Petitioner's parent company is General Host Corporation and petitioner has no non-wholly owned subsidiaries, Sup. Ct. R. 29.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment in pertinent part provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment in pertinent part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case is a tort action brought by two private parties against another private party, petitioner here. At jury selection, petitioner exercised a peremptory challenge to strike a black member of the venire. The court of appeals vacated the subsequent verdict for petitioner, holding that the constitutional rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), extends to private civil litigation and therefore demanded an inquiry into whether the peremptory strike was racially motivated. Petitioner challenges that holding.

1. In December 1985, respondent Martha Dunham was shopping at a store owned by petitioner, Frank's Nursery & Crafts (Frank's), in Merriville, Indiana. She inserted a Christmas ornament into an electrical outlet at the store. She received a shock and was injured. Pet. App. 2a.

Together with her husband, respondent Preston Dunham, Mrs. Dunham brought this diversity suit in federal district court, seeking damages from Frank's for its alleged negligence. The parties agreed that a United States Magistrate should preside over all proceedings, including the jury trial. During the selection of the jury, two black venire persons were among those seated for questioning. One was a friend of the Dunhams and was struck for cause. The other, who initially denied but then acknowledged that she knew two of the witnesses appear-

ing on the Dunhams' pre-trial witness list, was struck by Frank's through exercise of a peremptory challenge. *Id.* at 3a, 38a-44a.

The Dunhams, who are black, objected to the peremptory strike, claiming that it was racially motivated. The magistrate overruled the objection and declined to require Frank's to provide any explanation for the peremptory challenge. The magistrate stated that neither this Court nor the Seventh Circuit had extended to private civil cases the constitutional rule of *Batson v. Kentucky*, which allows criminal defendants to prove that the government prosecutors in their own cases unconstitutionally used peremptory challenges for racially discriminatory reasons. *Id.* at 44a.

After trial, the jury returned a verdict in favor of Frank's. The Dunhams appealed. Their sole contention was that the magistrate committed constitutional error in declining to apply to this case *Batson*'s directions for inquiring into whether a peremptory strike is racially motivated. *Id.* at 3a; C.A. Brief for Appellants at 4.

2. A divided panel of the Seventh Circuit agreed with the Dunhams' challenge to the trial court judgment. Recognizing that the circuits are in conflict on the issue, the court held that *Batson* applies to civil litigation between private parties, rejecting the contrary ruling of the Fifth Circuit in *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (en banc), *cert. granted*, 111 S. Ct. 41 (1990). Pet. App. 3a-14a. The court reasoned that *Batson*'s rationale, grounded on Fourteenth Amendment equal protection rights, reaches beyond the criminal context. *Id.* at 4a-6a. The court also concluded that, for constitutional purposes, it makes no difference whether a strike is exercised by a private party in a civil case, as it was here, or by a government official in a criminal case, as it was in *Batson* (and in *Swain v. Alabama*, 380 U.S. 202 (1965)). Pet. App. 9a-13a. In the majority's view, the trial court's acquiescence in the peremptory strike by

Frank's constituted the "state action" necessary to establish a constitutional violation. *Id.* (relying on *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

The court of appeals vacated the trial court judgment and remanded the case for the magistrate to determine whether the Dunhams can make out a prima facie equal protection violation. Pet. App. 14a. Judge Ripple dissented, reasoning that a private litigant's strike involves no state action and therefore is not subject to the constitutional limitation of *Batson*. *Id.* at 15a.

DISCUSSION

This case presents a single question: whether the constitutional proscription elaborated in *Batson v. Kentucky* applies to private civil litigants' exercise of peremptory challenges in jury selection. Petitioner submits that the court of appeals erred in holding that the *Batson* principle applies in this case to strikes by private litigants, who are not subject to the constraints of the Fifth (or Fourteenth) Amendment. This precise issue is currently before the Court in *Edmonson v. Leesville Concrete Co.*, No. 89-7743, in which oral argument was held on January 15, 1991. This petition should therefore be held for appropriate disposition in light of the Court's decision in *Edmonson*.

If the Court in *Edmonson* does not reach the constitutional issue, and rules instead that racially motivated peremptory strikes are proscribed by 28 U.S.C. §§ 1861 and 1862, the Court should grant this petition. Respondents have never raised a statutory claim. Only the constitutional issue has been raised, and that issue is dispositive here. Moreover, even if a statutory ruling in *Edmonson* would make the constitutional issue moot in future federal-court cases, the constitutional issue is important in state-court civil actions. In fact, state courts

have divided on the issue.[2] This case would present an appropriate opportunity to decide whether *Batson*'s constitutional rule binds private civil litigants.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Edmonson v. Leesville Concrete Co.*, No. 89-7743.

Respectfully submitted,

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Dated: February 28, 1991

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[2] *Compare Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989) (*Batson* applies to private civil actions); *Wilson v. Kauffman*, 563 N.E.2d 610 (Ind. Ct. App. 1990) (same) *with Chavous v. Brown*, 396 S.E.2d 98 (S.C. 1990) (*Batson* does not aply to private civil actions); *McDaniel v. Matchnick*, No. WD41498, 1990 Mo. App. LEXIS 1565 (Mo. Ct. App. Nov. 29, 1990) (en banc) (same); *Texas Health Enters., Inc. v. Tolden*, 795 S.W.2d 17 (Tex. Ct. App. 1990) (same).

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-2109

MARTHA DUNHAM and PRESTON DUNHAM,
Plaintiffs-Appellants,
v.

FRANK'S NURSERY & CRAFTS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. H87-707—Andrew P. Rodovich, *Magistrate*

ARGUED JANUARY 8, 1990—DECIDED DECEMBER 12, 1990

Before POSNER, RIPPLE, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* The issue in this case is whether the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986) forbids a private litigant in a civil case from exercising a peremptory challenge on racial grounds. Other circuits confronting this issue have reached opposite conclusions. In *Fludd v. J.B. Dykes*, 863 F.2d 822 (11th Cir. 1989), the Eleventh Circuit held that *Batson* applies to the exercise of

peremptory challenges by a private litigant in a civil case. In a recent *en banc* opinion, the Fifth Circuit held that *Batson* is limited to criminal cases. *Edmonson v. Leesville Concrete Co., Inc.*, 895 F.2d 218 (5th Cir. 1990) (en banc).[1] We declined to resolve this issue in *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988) on the grounds that it was not ripe for decision in that appeal. Today, we join the Eleventh Circuit in holding that *Batson* forbids a private litigant in a civil case from exercising a peremptory challenge on racial grounds.[2]

Martha Dunham was injured in December of 1985 while shopping at Frank's Nursey & Crafts in Merrillville, Indiana. Mrs. Dunham received an electrical shock when she placed a Christmas ornament plug into a portable electric outlet. Frank's directed its customers to use the portable outlet to test the working condition of electrical ornaments prior to purchase. Martha Dunham brought a negligence suit against Frank's to recover for her injuries; her husband, Preston Dunham, asserted a claim for lost consortium and services of his wife due to her injuries. Jurisdiction in federal court was based upon diversity of citizenship in accordance with 28 U.S.C. § 1332.[3]

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[1] The *en banc* opinion vacated the original panel opinion, which held that *Batson* applies to a private litigant in a civil case. *See Edmonson v. Leesville Concrete Co., Inc.*, 860 F.2d 1308 (5th Cir. 1988).

[2] In *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), the Eighth Circuit held that the requirements of *Batson* apply to a civil case when the government is the civil litigant exercising the peremptory challenge. *Id.* at 1008. The court declined to express a view on whether the action of a trial court alone, in a case involving no government litigants, can supply the necessary element of state action. *Id.* n.2.

[3] Martha and Preston Dunham are residents of Lake County Indiana; Frank's Nursery & Crafts, Inc. is incorporated in the state of Michigan and has its principal place of business in Michigan. The amount in controversy exceeds $50,000.

Frank's and the Durhams both consented to a United States Magistrate conducting all proceedings. On April 24, 1989, a jury trial was commenced. Both Mr. and Mrs. Dunham are black, and of the jury panel examined during voir dire, the only black member to be seated on the petit jury was peremptorily struck by Frank's. The Dunhams objected to this peremptory strike, claiming that it was racially motivated. The magistrate declined to require Frank's to provide a non-racial explanation for its strike, correctly noting that neither the Supreme Court nor the Seventh Circuit has held that *Batson* applies to a civil case. The case proceeded to trial with a jury of seven white members. On April 28, 1989, the jury rendered a verdict against the Dunhams finding that, under Indiana's Comparative Fault Act, Martha Dunham's fault was greater than fifty percent. The Dunhams appeal solely on the ground that the magistrate erred in declining to order Frank's to provide a non-racial explanation for its peremptory strike as required by *Batson*.

In *Batson*, the Supreme Court held that the equal protection clause of the fourteenth amendment forbids a prosecutor in a state criminal trial from using peremptory challenges to strike potential jurors from the venire solely because they are of the same race as the defendant. 476 U.S. at 89, 106 S. Ct. at 1719.[4] In addition, the Court formulated an evidentiary standard for establishing that the state has struck a potential juror on account of his race. Specifically, the Court held that the prosecutor's striking of a defendant's racial peer from

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[4] *Batson* was based on the equal protection clause of the fourteenth amendment, which applies only to the states, not the federal government. However, the right to equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment, which applies to federal action. *Johnson v. Robison*, 415 U.S. 361, 364, 94 S. Ct. 1160, 1164 n.4 (1974); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694 (1954).

the venire can be used as circumstantial evidence of the prosecutor's discriminatory intent. In so doing, the Court overruled the portion of *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965) which held that a prosecutor's use of peremptory challenge is presumptively based on proper considerations related to the case he is trying. Departing from *Swain*, the Court concluded that a defendant may establish a prima facie case of racial discrimination solely on evidence concerning the prosecutor's use of peremptory challenge at the defendant's trial. *Batson*, 476 U.S. at 95-96, 106 S. Ct. at 1722-23.

In order to establish a prima facie case under *Batson*, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to prevent members of his race from serving on the jury. Second, the defendant is entitled to rely on the fact that the mere exercise of a peremptory challenge can be used as circumstantial evidence of discriminatory intent. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptories to exclude veniremen from the petit jury on account of their race. *Id.*

Once the defendant makes a prima facia showing, the burden shifts to the state to come forward with a nonracial explanation for its challenge. Although the prosecutor's explanation does not have to rise to the level of cause, the mere denial of a discriminatory motive, or an affirmation of prosecutorial good faith does not suffice as a neutral explanation. After hearing the state's explanation, the trial court must determine if the defendant has established purposeful discrimination. *Id.* at 97-98, 106 S. Ct. at 1723-24.

It is important to emphasize that the holding of *Batson* was based on the equal protection clause of the fourteenth amendment, not the sixth amendment right to a jury trial

in criminal cases.[5] While sixth amendment rights apply only to criminal defendants, equal protection rights apply to civil litigants as well as criminal defendants. Accordingly, the equal protection rationale underlying *Batson* does not stem from any rights or protections afforded to a criminal defendant that are not afforded to a civil litigant. The Court in *Batson* based its holding on three basic principles. First, the Court stated that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply 'is unrelated to his fitness as a juror.'" 476 U.S. at 87, 106 S. Ct. at 1718 (citations omitted). Second, the Court stated that a prosecutor shall not be allowed to assume that a juror of the defendant's race will be partial to the defendant simply because of their shared race. *Id.* at 97, 106 S. Ct. at 1723. Finally, the court reasoned that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87, 106 S. Ct. at 1718. It is obvious that these three principles are not dependent upon the fact that the jurors in *Batson* were being selected to sit for a criminal trial rather than a civil trial. Because the rationale of *Batson* is not inherently dependent upon the fact that *Batson* was a criminal proceeding, it is only logical to conclude that the

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[5] The Court declined to express a view on the merits of Batson's sixth amendment arguments. 476 U.S. at 84, 106 S. Ct. at 1716 n.4. Recently, in *Holland v. Illinois*, —— U.S. ——, 110 S. Ct. 803 (1990), the Court held that the fair cross section requirement of the sixth amendment does not prevent either side in a criminal prosecution from exercising its peremptory challenges in order to exclude cognizable racial or other groups from the petit jury as long as the venire itself is drawn from a fair cross section of the community.

Supreme Court would not intend the equal protection requirements of *Batson* to be limited to criminal cases.

This conclusion does not end our analysis, however, for the Constitution does not forbid private persons from discriminating. For a civil litigant to invoke the requirements of the equal protection clause, the litigant must show that the alleged discriminatory act is "state action" subject to the dictates of the Constitution. State action is readily apparent in the context of a criminal case; for there, a representative of the state—the prosecutor—exercises the peremptory challenge. However, state action is not so obvious in a civil case where the party utilizing the peremptory challenge is often a private individual, not a representative of the state. But the fact that a private litigant exercises a peremptory challenge does not automatically make that act private. As the level of interaction and cooperation between private individuals and the state rises—as it does in the jury selection process—it becomes increasingly difficult to discern precisely where private conduct ends and state action begins. In this case, Frank's, a private litigant, is the alleged discriminatory actor. For *Batson* to apply in this situation, the alleged discriminatory act—Frank's exercise of a peremptory challenge—must fairly be said to be conduct attributable to the state. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721, 81 S. Ct. 856, 860 (1961).

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744 (1982), the Supreme Court established a two-part framework for determining the presence or absence of state action. The first part asks whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority. *Id.* at 937, 102 S. Ct. at 2753-54. As Frank's concedes, this requirement is clearly satisfied here. Specifically, 28 U.S.C. § 1870 provides that each party in a civil case shall be entitled to three peremptory challenges.

The crucial question is whether the Dunhams can establish *Lugar*'s second requirement: under the facts of a given case, can the party charged with the deprivation appropriately be characterized as a "state actor"? *Id.* The Court emphasized that a private party who exercises a right having its source in state authority—*Lugar*'s first requirement—is not considered a state actor—*Lugar*'s second requirement—absent "something more." *Id.* at 937-39, 102 S. Ct. at 2754.

Determining what constitutes "something more" is far from a precise task. In *Lugar*, the Court referred to its own use of several different tests in making this determination, including the "public function" test, *see Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809 (1953); *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276 (1946); the "state compulsion" test, *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970); the "nexus" test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449 (1974); *Burton v. Wilmington Parking Auth.*, *supra*; and the "joint action" test, *see Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729 (1978); *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948). The Court questioned whether these tests are actually different in operation or are simply different ways of "characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation." *Lugar*, 457 U.S. at 939, 102 S. Ct. at 2755. The Court concluded that, in the final analysis, the state action determination must be based on the specific facts and the entire context of a given case. " 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' " *Id.* (citing *Burton*, 365 U.S. at 722, 81 S. Ct. at 860).

At the outset of this "necessarily fact-bound inquiry," it is instructive to examine the key facts of relevant precedents in which the Court has traced the line that separates private conduct from government action. In *Shelley v. Kraemer*, *supra*, the Court established that the equal protection clause forbids judicial enforcement of

private, racially restrictive covenants. The Court held that enforcement of such private agreements by judicial officers in their official capacities amounted to state action. The Court applied a but for analysis, reasoning that, absent the intervention of the enforcing court, supported by the full panoply of state power, the persons excluded by the covenants would have been free to occupy the properties at issue. 334 U.S. at 19, 68 S. Ct. at 845.

In *Burton v. Wilmington Parking Auth.*, *supra*, the Court found that the state acted when a privately owned restaurant located in a state owned and operated parking garage refused to serve a black would-be-patron. Although the decision to discriminate was made by the restaurant owner, a private concern, the Court reasoned that the state could have affirmatively required the restaurant not to discriminate as a precondition to renting space in the parking garage. 365 U.S. at 725, 81 S. Ct. at 861-62. The Court reasoned that through its inaction, the state elected to place its power, property and prestige behind the admitted discrimination. The Court concluded that regardless of the state's motive, it was not allowed to effectively abdicate its responsibility to prohibit racial discrimination occurring on its property. *Id.*

Recently, in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340 (1988), the Court concluded that the activities of a probate court in a dispute between private parties caused the acts of one party to amount to state action. *Tulsa* involved a provision of the Oklahoma Probate Code barring creditor claims against an estate unless those claims are presented to the estate no later than two months after the estate notifies creditors that probate proceedings had commenced. A creditor who failed to comply with the two month requirement contended that the estate's notification did not comply with the requirements of the due process clause because the estate provided only publication notice

to creditors as opposed to personal notice. *Id.* at 479-81, 108 S. Ct. at 1341-43.

The Court held that the estate's act of providing notice was an act that could be attributed to the government because of the probate court's role in the notification process in particular and the probate process in general. Specifically, the Court emphasized that the two month time bar did not begin to run until the probate court appointed an executrix and required her to file a copy of the estate's notice and an affidavit stating that the notice had been published. The Court reasoned that the role of the probate court was "so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." *Id.* at 487, 108 S. Ct. at 1345-46. The Court concluded that whenever "private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Id.* at 486, 108 S. Ct. at 1345.

We now turn to whether there was state action in this case. The key is to determine whether the trial court's participation in Frank's exercise of its peremptory challenge is substantially different than the state's involvement in *Shelley*, *Burton*, or *Tulsa*. In holding that state action is absent in a civil case, Judge Thomas Gibbs Gee, writing for the *en banc* panel of the Fifth Circuit in *Edmondson*, characterized the role of a trial judge as follows:

> [t]he merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined. No exercise of judicial discretion is involved, rather a mere standing aside: so that the fault—if it is a fault—lies with the system which permits such challenges, not with the judge's mere ministerial compliance with what the rule requires.

895 F.2d at 221-22 (footnotes omitted). Judge Gee reasoned that this "mere standing aside" cannot constitute "action" in light of Supreme Court pronouncements that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982) (citing cases), and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the . . . Fourteenth Amendment." *Id.* (citing cases).[6]

While the approach of the Fifth Circuit is certainly plausible, we believe that Supreme Court precedent requires a different characterization of the role of a trial judge in the peremptory challenge process. Analogizing to *Shelley*, *Burton*, and *Tulsa*, we are unable to characterize a judge's role as that of a "ministerial bystander."[7] Admittedly, this case is different than *Shelley* in one key respect—a judge enforcing peremptory challenges, unlike a judge enforcing racial covenants, does not exercise judicial discretion; once a private litigant exercises a peremptory challenge, the judge has no choice but to excuse the stricken panel member. However, in applying a but for analysis in *Shelley*, the Court focused on a court's coercive powers, not its discretionary powers.

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[6] The facts of *Blum v. Yaretsky*, *see accompanying text*, are not pertinent to our case. Unlike this case, the private action at issue in *Blum* failed to satisfy *Lugar's* first prong. In *Blum*, the Court noted that it was dealing with a case "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." 457 U.S. at 1003, 102 S. Ct. at 2785.

[7] The portion of the *en banc* opinion in *Edmonson* pertaining to state action does not discuss *Shelley*, *Burton*, or *Tulsa*. *See Edmonson*, 895 F.2d at 221-22.

A similar but for analysis is applicable here. Like the racial covenants in *Shelley*, enforcement of a peremptory strike is ultimately dependent upon the judge's coercive powers. When a private litigant peremptorily challenges a panel member, that challenge is not self-effectuating. The litigant may exercise the peremptory challenge—but it is the presiding judge who then exercises his authority to excuse the juror from service. All jurors are under the control of the presiding judge during the course of the trial. It is this control over the jury and its selection procedures, inherent in the powers of a federal judicial officer, which demonstrates that the ultimate enforcer of a peremptory challenge is the trial judge; enforcement is not dependent upon an agreement between the private parties.

In excusing a juror, the state, no less than in *Burton*, places its power and prestige behind the admitted discrimination. In addition, peremptory challenges are invoked in a courtroom operated by the government. If the Court in *Burton* did not allow the state to abdicate its responsibility to prohibit racial discrimination in a parking garage, it only seems logical that the Court would not allow the state to abdicate this responsibility in a court of law.

Up to this point, we have focused only on the function of a trial judge in excusing a juror pursuant to a private litigant's peremptory challenge. In finding state action in *Tulsa*, however, the Court did not limit its focus to the role of the probate court in the process by which the estate provided notice; rather, the Court emphasized the importance of the probate court's overall involvement in the probate proceedings. Likewise, our state action inquiry should focus on the overall involvement of the trial court in the jury selection process. The role of a federal district court in the jury seelction process appears to be at least as pervasive as the role of the probate court in *Tulsa*. Congress determines the qualifications for jury service and the method of summoning jury panels; the

district court, in turn, enforces those standards. 28 U.S.C. § 1865. In order to avoid discrimination in the selection of jury venires, Congress also requires each district court to devise and enforce a plan for random jury selection. 28 U.S.C. § 1863. The clerk of the district court summons the venire to appear in court at a particular time and place. Of course, jury service in the federal system is not optional—if not excused by the district court, a summoned juror must fulfill jury duty.

In regard to the exercise of peremptory challenges, there are several discretionary measures open to a judge which tend to belie the characterization of the judge as a "ministerial bystander." For example, while the number of peremptory challenges is determined by statute in single party civil cases, a trial judge has broad discretion in determining the appropriate number and allocation of peremptory challenges in multiparty civil cases. 28 U.S.C. § 1870. Perhaphs more important, the trial judge indirectly determines the impact of any given number of peremptory strikes. Local court rules control the number of jurors empaneled in civil cases, thereby governing the relative effectiveness of peremptory challenges in determining the composition of a jury. The trial judge controls the conduct of voir dire and the range of information that may be discovered about a jury panel member, thus affecting the exercise of both challenges for cause and peremptory challenges. In addition, the judge has broad discretion over whether or not to excuse a juror for cause, thus determining the number of jurors who remain eligible for the exercise of peremptory strikes.

Finally, a trial judge enjoys broad discretion in determining the manner in which peremptory challenges are exercised: he can decide which party exercises the last challenge; he can require the parties to exercise their challenges simultaneously in writing; or he can require one party to exercise all of its challenges first,

thereby allowing the other party to act with full knowledge of its opponent's choices.

We do not think the role of the trial court in Frank's peremptory strike is significantly different than the role of the state in *Shelley*, *Burton*, or *Tulsa*. Accordingly, we conclude that the requisite state action is present in this case.

There is one final point we should address, however: the *en banc* court in *Edmonson* noted that the Court in *Batson* declined to hold that the equal protection clause prohibits defense counsel in a criminal case from exercising peremptory challenges on racial grounds. 895 F.2d at 222. The *en banc* court hinted, and Frank's now argues, that the Court's failure to so hold is inconsistent with the view of the trial court as state actor. *Id.* We disagree. The Court in *Batson* explicitly declined to express a view one way or the other on whether the Constitution imposes any limits on the exercise of peremptory challenges by defense counsel. 476 U.S. at 89 n.12, 106 S. Ct. at 1719 n.12. Thus, it is clear that the Court in *Batson* did not address the issue of whether the trial court supplies the necessary state action in the context presented in this case.

Since *Batson* was decided in 1986, a debate has ensued as to whether it makes sense to allow a right to peremptory challenges—a device admittedly intended to allow a party to strike a potential juror for any reason, be it a hunch, an assumption or an intuitive judgment —once the Supreme Court created an equal protection exception to that right. One thing is certain—the future viability of peremptory challenges is quite uncertain. As of this date, the Supreme Court has not made clear whether the equal protection rationale of *Batson* forbids the exercise of peremptory challenges with regard to other cognizable categories such as sex, ethnic origin, religion and so on. *See Batson*, 476 U.S. at 124, 106 S. Ct. at 1737 (Burger, C.J., dissenting). Some pro-

pose that we should completely abolish peremptory challenges (as they have in England), *see Batson*, 476 U.S. at 106-08, 106 S. Ct. at 1728-29 (Marshall, J., concurring), while others argue that we should restore peremptory challenges to the pre-*Batson* right with no exceptions. Regardless of what position one favors, the current status of the law—peremptory challenges which are not truly peremptory, with exceptions for some reasons but not others—hardly seems satisfactory. *See United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984) (Posner, J.) (permitting inquiry into the basis for a peremptory challenge causes it to collapse into a challenge for cause); Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153 (1989).

For our purposes today, however, the debate over the partial invalidation of peremptory challenges was resolved by the Supreme Court in *Batson*; thus, our views on its merits are irrelevant to deciding this appeal. Our basic task has been to determine the presence or absence of state action. Having found the requisite state action, we are bound to hold that the requirements of *Batson* apply to Frank's use of its peremptory challenge. Accordingly, we must remand this case to the district court for it to determine whether the Dunhams can establish a prima facie case of racial discrimination. If the Dunhams establish a prima facie case, then the district court must require Frank's to show that it had some neutral, that is, non-racial reason for its challenge. If Frank's does not come forward with a non-racial explanation for its challenge, the district court shall order a new trial.

The case is REMANDED for further proceedings consistent with this opinion.

RIPPLE, *Circuit Judge*, dissenting. Since the Supreme Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), "the principle has become firmly embedded in our

constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1947). The majority ignores this "firmly embedded" principle. Because *Batson v. Kentucky*, 476 U.S. 79 (1986), does not require us to find that state action exists when private litigants exercise peremptory challenges in civil actions, and because both Supreme Court and Seventh Circuit precedent mandate that no state action is present under these circumstances, I respectfully dissent.

I

A. *The Road to Batson*

The line of precedent culminating in *Batson* has its genesis in *Strauder v. West Virginia*, 100 U.S. 303 (1879). In *Strauder*, a black criminal defendant, Strauder, was charged with murder. Pursuant to a West Virginia statute limiting jury service to white males,[1] the venire summoned for the trial was composed exclusively of white men. Before jury selection began, Strauder objected and argued that the state law did not afford him equal protection of law by prohibiting blacks from jury service. The trial court overruled his objeciton; the all-white jury convicted Strauder of murder. *Id.* at 304. The Supreme Court of West Virginia affirmed Strauder's conviction. *See State v. Strauder*, 11 W. Va. 745 (1877).

The United States Supreme Court granted certiorari to determine whether, under the fourteenth amendment, all blacks "may be excluded by law, solely because of their

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[1] The West Virginia statute provided as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The exceptions were for State officials. 100 U.S. at 305.

race or color, so that by no possibility can any colored man sit upon the jury." *Strauder*, 100 U.S. at 305. The Court held that the fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under law are enjoyed by white persons" and to deny "any State the power to withhold from them the equal protection of the laws . . . ." *Id.* at 306. Consequently, the Court determined that the West Virginia statute did not afford blacks equal legal protection, and therefore violated the fourteenth amendment. Central to the Court's decision was the proposition that, if blacks were to be protected from the racial prejudice that the fourteenth amendment was designed to eliminate, blacks must be eligible for jury service:

> And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

Id. at 309.

The Supreme Court was again confronted with an impediment to the participation of blacks on juries in *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, the petitioner was convicted of rape and sentenced to death. Swain challenged the jury selection process. He claimed that the prosecutor's use of peremptory challenges to remove all of the black members from the venire constituted a denial of equal protection of law.[2] As further evidence

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[2] Contrary to the Eleventh Circuit's assertion in *Fludd v. Dykes*, 863 F.2d 822, 826 (11th Cir.) (emphasis supplied), *cert. denied*, 110 S. Ct. 201 (1989), Swain did not claim "that the *trial judge* denied him the equal protection of laws *when he permitted the prosecutor* to exercise the state's peremptory challenges to rid the venire of blacks because of their race." Rather, Swain's challenge, and the

of the equal protection violation, Swain noted that the state had used its peremptory challenges to remove all blacks who had been summoned for jury duty during the past twelve years. The Court refused to overturn Swain's conviction. In addressing the challenge to the prosecutor's use of the state's peremptory challenges, the Court presumed that the prosecutor was "acting on acceptable considerations related to the case he [was] trying, the particular defendant involved and the particular crime charged." *Id.* at 223. The Court found that this presumption was warranted "[i]n light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial. *Id.* at 222.

> Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges," *Stilson v. United States*, 250 U.S. 583, 586, nonetheless the challenge is "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice, *Lewis v. United States*, [146 U.S. 370, 376]; *Harrison v. United States*, 163 U.S. 140; cf. *Gulf, Colorado & Santa Fe R. Co. v. Shane*, 157 U.S. 348. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full

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Court's analysis, focused on the *prosecutor's* use of peremptory challenges in the Alabama jury system.

The Alabama "struck jury" system operated as follows: in a criminal case, about 35 people were drawn to comprise the petit jury venire. If a capital offense was involved, about 100 were drawn. "After excuses and removals for cause, the venire in a capital case is reduced to about 75. The jury is then 'struck'—the defense striking two veniremen and the prosecution one in alternating turns, until only 12 jurors remain." *Swain v. Alabama*, 380 U.S. at 210.

> freedom, or it fails of its full purpose." *Lewis v. United States, supra*, at 378.

Swain, 380 U.S. at 219.

In the Court's view, it was inappropriate to examine the prosecutor's reasons for the exercise of his challenges. "Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Id.* at 221. Indeed, the Court stated that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, *without inquiry and without being subject to the court's control.*"[3] *Id.* at 220 (emphasis supplied). Therefore, the court found that there must be a presumption that the prosecutor was using his peremptory challenges to secure an impartial jury. This presumption was not overcome, and the prosecutor subject to examination concerning the use of his peremptory challenges, "by allegations that in the case at hand all Negroes were removed from the jury or that they were removed

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[3] This statement clearly demonstrates that the Court does not consider the present peremptory challenge system to be within the control of the trial court. Because the court has no control over the use of peremptory challenges, any action taken by the trial court must be classified as "merely ministerial." *See Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 221 (5th Cir. 1989) (en banc), *cert. granted*, 59 U.S.L.W. 3243 (U.S. October 1, 1990) (No. 89-7743).

That the Court distinguished between judicial "inquiry" and "control" is also significant. The statement implies that even if a court were to inquire into the nature of the peremptory challange, the court would still possess no control over the peremptory challenge. Thus, the court's role would still be characterized as ministerial.

From these statements, it is clear that the Supreme Court's decision in *Batson* was not based on the power of the trial judge. Rather, it is the prosecutor who is the state actor. It is also clear that even in a *post-Batson* criminal trial where the court inquires into the reasoning of the prosectuor for the use of a peremptory challenge, the Supreme Court would not consider the trial judge to be a state actor for the purposes of equal protection analysis.

because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." *Id.* at 222.

The Court did, however, establish an evidentiary framework that might be employed by defendants to challenge the use of peremptory challenges. Basically, the defendant was required to show that peremptories were being used by the prosecutor to disqualify blacks generally from jury service before the defendant could mount a successful equal protection challenge under *Swain*. As the Court later noted in *Batson*, in response to *Swain*, lower courts required the defendant to demonstrate repeated striking of blacks over a number of cases to establish an equal protection violation. *See Batson*, 476 U.S. at 92. "Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93.

B. *Batson v. Kentucky: Easing the evidentiary burden*

James Batson, a black male, was indicted for receiving stolen goods and for burglary. The prosecutor struck all four blacks from the venire; an all-white jury was selected. Batson moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated his rights under the equal protection guarantee of the fourteenth amendment. The trial judge denied the motion. The jury convicted Batson. The Kentucky Supreme Court affirmed the conviction; it held that *Swain* required a defendant alleging a lack of a fair cross section to demonstrate systematic exclusion of a group of jurors from the venire. *Batson*, 476 U.S. at 82-84.

The Supreme Court reaffirmed the principle established in *Swain* that a prosecutor's use of peremptory challenges to exclude systematically blacks from serving as jurors could violate the equal protection clause of the fourteenth amendment. In order to establish a prime facie case of

discrimination in the selection of the venire, the defendant must demonstrate that he is a member of a group capable of being separated for differential treatment and must show discrimination against veniremen of his race. To show discrimination, the defendant may prove systematic exclusion of the members of his race in his jurisdiction—the *Swain* standard. *Id.* at 94. However, "[s]ince the ultimate issue is whether the state has discriminated in selecting the defendant's venire, . . . the defendant may establish a prima facie case 'in other ways than by evidence of long-continued unexplained absence' of members of his race 'from many panels.'" *Id.* at 95, (quoting *Cassell v. Texas*, 339 U.S. 282, 290 (1950) (plurality opinion)). Therefore, the Court implemented a less demanding process of proof. A defendant could make a prima facie showing of discrimination solely on the basis of the prosecutor's use of peremptory challenges at the defendant's trial. A defendant must demonstrate only that the use of peremptory challenges, and any circumstances relevant in his case, raises an inference that the prosecutor used the peremptories to exclude veniremen because of their race. *Id.* at 93-96. After the defendant makes a prima facie showing, the burden shifts to the prosecutor to advance a neutral explanation for challenging the jurors. Although the prosecutor's explanation need not rise to the level of a challenge for cause, the prosecutor must do more than merely affirm his good faith; the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.* at 98.

C. *Applying Batson to civil cases*

In order to find the necessary state action to render the fourteenth amendment applicable in *Batson*, the Court clearly relied on the role that the *prosecutor* plays in exercising peremptory challenges. The defendant makes a prima facie case based on "evidence concerning the *prosecutor's* exercise of peremptory challenges" by showing "that the *prosecutor* has exercised peremptory chal-

lenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96 (emphasis supplied). The defendant's allegation must raise "an inference that the *prosecutor* used" his peremptory challenges to exclude veniremen because of their race. "The *prosecutor* . . . must [then] articulate a neutral explanation" to rebut the defendant's case. *Id.* at 98 (emphasis supplied).

The role of the trial judge in the peremptory challenge process was not perceived by the Court in *Batson* to constitute state action. The Court expressly reserved judgment on whether strikes by defense counsel in a criminal case could implicate the fourteenth amendment. *Id.* at 89 n.12. As the Fifth Circuit has noted, it is difficult "to see how the Supreme Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the 'actor' was the judge." *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 222 (5th Cir. 1989) (en banc), *cert. granted*, 59 U.S.L.W. 3243 (U.S. October 1, 1990) (No. 89-7743); *see also Wilson v. Cross*, 845 F.2d 163, 164-65 (8th Cir. 1988) ("we have strong doubts about whether *Batson* was intended to limit the use of peremptory challenges in civil cases").

That the Court based its analysis on the role of the prosecutor is more than clear; it is also sensible. In criminal cases, the entire proceeding is "commenced and carried through by the prosecuting attorney, the very embodiment of the state's power . . . ." *Edmonson*, 895 F.2d at 221. Indeed, the Court found the prosecutor so closely related to the State that the Court used the terms "prosecutor" and "State" interchangeably: "Once the defendant makes a prima facie showing, the burden shifts to the *State* to come forward with a neutral explanation for challenging black jurors. . . . [W]e emphasize that the *prosecutor's* explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97.

In sum, the Supreme Court's focus on the prosecutor in *Batson* is the natural outgrowth of the Court's earlier

precedent. *Strauder* began by finding that states could not bar black citizens from participating in the administration of criminal justice. *Swain*, while setting very high evidentiary standards, attempted to prevent states from accomplishing this same purpose through the use of peremptory challenges. In *Batson*, the Court simply lowered the height of the evidentiary hurdles that defendants need to clear in order to establish equal protection violations in criminal cases.[4] Nothing more, nothing less. Therefore, *Batson*, by its own terms, is inapplicable to civil cases.

Apparently conceding that nothing in *Batson* explicitly supports an extension into the civil trial, the majority turns to a more nebulous argument—that *Batson* is not inherently dependent upon the fact that it was a criminal proceeding, and that its equal protection requirements should therefore extend to civil cases. Yet *Batson is* inherently dependent upon the fact that it was a criminal trial. Criminal and civil trials are simply different. In a criminal trial, the state, through its prosecutor, wins when justice is done.[5] The civil advocate wins only if the verdict is favorable to his client. In a criminal prosecution, the government is directly involved in the proceeding. The government appears in the person of the prose-

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[4] Justice Powell's opinion in *Batson* expressly states that its scope is limited to a reexamination of "that portion of Swain . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race" from the jury. *Batson*, 476 U.S. at 82.

[5] *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212 (1960).

cutor, a person clearly clothed with the authority of the state and without counterpart in civil litigation. "But, more fundamentally, the entire purpose of a criminal prosecution is to enforce the purposes of the state, whereas the state has no purpose at all in civil litigation beyond preempting the use of private force to settle disputes—a purpose that is as well served, if the parties consent, by an arbitration to which the state is no party." *Edmonson*, 895 F.2d at 223.

This fundamental difference with respect to the role of the government in criminal cases has long been recognized by both the legislative and judicial branches of government. Congress has recognized that different interests are at stake in criminal and civil trials by providing differing numbers of peremptory challenges.[6] In criminal trials, the state puts the defendant's life and liberty interests at stake. The defendant can face imprisonment or even death.[7] The Court has treated criminal and civil cases differently in other contexts. For example, the equal

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[6] 28 U.S.C. § 1870 governs the number of peremptory challenges allotted in a federal civil case: "In a civil case, each party shall be entitled to three peremptory challenges."

The use of peremptory challenges in criminal cases is governed by Fed. R. Crim. P. 24(b), which provides as follows:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. . . .

[7] Thus, Congress permits each side 20 peremptory challenges if the offense is punishable by death; the government receives 6 and the defendant 10 peremptory challenges if the offense is not punishable by death. The civil litigant's interests, while important, do not rise to the level of the criminal defendant's interests. Accordingly, Congress has provided that each side should receive only three peremptory challenges.

protection clause requires government to provide indigent-defendants with counsel through a first appeal.[8] Similarly, the Court has required the government to waive filing and transcript fees for indigent-defendants.[9] Indigents in civil trials enjoy no such entitlement.[10] Thus, extending *Batson* to civil cases requires us to ignore the very real differences between the state's role in criminal and civil cases.[11]

Applying *Batson* to criminal cases also requires a rejection of the Supreme Court's characterization of peremptory challenges. "The *essential nature* of the peremptory challenge is that it is one exercised . . . *without being subject to the court's control.*" *Swain*, 380 U.S. at 220 (emphasis supplied). "The merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined." *Edmonson*, 895 F.2d at 221. Because the trial court has no control over the peremptory challenge, determining that the trial judge's acquiescence constitutes state action requires a radical liberalization

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[8] *See Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas v. California*, 372 U.S. 353 (1963).

[9] *See Griffin v. Illinois*, 351 U.S. 12 (1956).

[10] *See United States v. Christ*, 409 U.S. 434 (1973) (waiver of filing fee in bankruptcy proceeding not required under equal protection); *Ortwein v. Schwaab*, 410 U.S. 656 (1973) (upholding state filing fees for appellate court review of agency's reduction in welfare payments).

[11] At least one federal district court has noted a further distinction between civil and criminal trials. In *Esposito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986), the court held *Batson* inapplicable to civil cases. The court reasoned that a criminal defendant is entitled to more protection than a civil plaintiff because the criminal defendant is an involuntary participant in the trial and has no choice in the forum. A civil plaintiff, however, initiates the judicial process, chooses the forum, and, in some cases, chooses whether to have a jury. *Id.* at 761.

of the state action requirement. Such a liberalization also requires a rejection of the Court's statements in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citations omitted), that government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment."

II

Unable to find any tangible support within *Strauder*, *Swain*, or *Batson* for the proposition that the trial judge is a state actor when he dismisses a juror after a peremptory challenge (and ignoring clearly marked signs to the contrary), the panel majority retreats into the jungle of Supreme Court decisions dealing with the state action doctrine. The majority fairly states the issue: Frank's, a private litigant, is the alleged discriminatory actor. To find the requisite state action necessary to apply the equal protection constraints of the fourteenth amendment to peremptory challenges, the alleged discriminatory act—Frank's exercise of a peremptory challenge—must fairly be said to be conduct of the state. *Ante* at 6.

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot be fairly blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). *Lugar* established a two-prong test to determine whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." *Id.* at 937. The first prong of the *Lugar* test

requires that the "claimed deprivation . . . result[] from the exercise of a right or privilege having its source in state authority." *Id.* at 939. As Frank's concedes here, and the majority correctly notes, this first prong is clearly satisfied—28 U.S.C. § 1870 provides that each party in a civil case is entitled to three peremptory challenges. *See also Edmonson*, 895 F.2d at 221 (holding first *Lugar* requirement satisfied in civil trials).

Lugar's second prong examines whether the private party "has acted together with or has obtained signficant aid from state officials, or [whether] his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. The second prong is crucial: without it, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.* *Lugar* thus states that mere action by a private party pursuant to a statute, "without something more," does not justify characterizing that party as a state actor. *Id.* at 939. The Court described the inquiry into whether "something more" is present as "necessarily factbound." [12] *Id.* Nevertheless, the majority selects three

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[12] The majority correctly cites the various factors and tests, mentioned by the Court in *Lugar*, as relevant in past Supreme Court decisions. *Ante* at 6-7. But the majority fails to mention the Court's statement that "we do not hold today that 'a party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law.'" *Lugar*, 457 U.S. at 939 n.21. The inquiry as to whether a private person's actions are performed under color of state law is identical to the state action determination. *Id.* at 928; *see also United States v. Price*, 383 U.S. 787, 794 n.7 (1965) (action " 'under color' of state law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment").

The majority in *Lugar* was responding to Justice Powell's dissent. Justice Powell, the author of *Batson*, had argued that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with

cases as "relevant precedents" that establish the frontier between state action and private conduct.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Shelleys, a black family, purchased a home in St. Louis, Miscouri, from Fitzgerald, a willing seller. Almost two months later, several nearby landowners brought suit to divest title to the property from the Shelleys and to revest title in Fitzgerald. The suit was based on a racially restrictive covenant that had been signed by most of the landowners in the area; Fitzgerald's land was subject to the covenant. The trial court denied the requested relief. *Id.* at 4-5. When the court rendered its decision, the Shelleys were occupying the property in question. *Id.* at 6. The Supreme Court of Missouri reversed and directed the trial court to revest title in Fitzgerald. The state supreme court found that the racially restrictive agreement was enforceable and violated no federal constitutional provision. The Supreme Court of the United States reversed. It held that judicial enforcement of racially restrictive covenants violated the equal protection clause. The Court reasoned that state court action was not "immunized" from the operation of the fourteenth amendment, and thus judges could be state actors. *Id.* at 18. Because this case required "the active intervention of the state courts, supported by the full panoply of state power," to displace the Shelley's from their home, state action existed. *Id.* at 19.

The majority concedes that *Shelley* is different from this case "in one key respect—a judge enforcing peremptory challenges, unlike a judge enforcing racial cove-

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the judge." *Lugar*, 457 U.S. at 951 (Powell, J., dissenting), (quoting *Dennis v. Sparks*, 449 U.S. 24, 28 (1980)). Justice Powell further noted that "invocation of the state legal process is 'essentially a private function . . . for which state office and authority are not needed.'" *Id.* (quoting *Polk County v. Dodson*, 454 U.S. 312, 319 (1981)). Moreover, Justice Powell added that "independent, private decisions made in the context of litigation cannot be said to occur under color of law." *Id.*

nants, does not exercise judicial discretion; once a private litigant exercises a peremptory challenge, the judge has no choice but to excuse the stricken panel member." *Ante* at 10. The majority contends, however, that *Shelley* was based on the court's "coercive" power. But, here too, there is a very substantial difference between *Shelley* and peremptory challenges in a civil case. Although the coercive power of the state court was undoubtedly important to the Supreme Court's decision, the coercion in *Shelley* was of an entirely different character than any "coercion" present in the context of peremptory challenges. In *Shelley*, the Shelleys were already living in the house. To remove them, the court, through the use of its injunctive power, necessarily would have had to give effect to a facially discriminatory covenant—where it had the discretion not to so enforce. The court would have utilized "the full panoply of state power" to displace the Shelleys. Finally, the court would have ordered the revesting of the property to Fitzgerald.

The degree of judicial coercion in *Shelley* stands in stark contrast to the judicial involvement in the peremptory challenge. The judge has no discretion to reject the peremptory challenge. A peremptory challenge is not facially discriminatory. A judge does not render a decision or issue an order in a peremptory challenge. And most importantly, the judge takes no affirmative, enforcement role in the peremptory challenge process. *Shelley* simply does not stand for the proposition that *all* judicial action constitutes state action. It should not be read so broadly. As commentators have cautioned:

> If Shelley were read at its broadest, a simple citation of the case would have disposed of most subsequent cases. Some seemingly "neutral" state nexus can almost always be found. . . . Given the entanglement of private choices with law, a broad application of Shelley might in effect have left no private choices immune from constitutional restraints.

G. Gunther, Constitutional Law 879 (11th ed. 1985).[13] *Shelley* merely recognized that judicial action was not "immunized" from constituting state action. This is a far cry from finding state action on the vague basis of the "inherent . . . powers of a federal judicial officer." *Ante* at 10. Indeed, if the judicial action in excusing a juror after private counsel exercises a peremptory challenge is state action, then virtually all judicial conduct must establish state action.

> If the judge is the actor, then, and if his mere excusing of veniremen who have been peremptorily challenged from further attendance at court be deemed an "act," it follows that every aspect of every civil trial, state and federal, is constitutionalized—a quantum procedural leap that we leave for the Supreme Court to make, should it wish to do so.

Edmonson, 895 F.2d at 222; *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1977) ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief . . . .").

The Supreme Court "has never held that a State's mere acquiescence in a private action converts that action into action of the State." *Flagg Bros.*, 436 U.S. at 164. In *Flagg Bros.*, the Court considered whether a warehouse-

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[13] *See also* J.E. Nowak, R.D. Rotunda, J.N. Young, Constitutional Law 498 (2d ed. 1983) ("The *Shelley* decision should not be taken as holding that any judicial decree which disadvantages members of a racial minority violates the fourteenth amendment.").

Professor Gunther's comment that some "state nexus can almost always be found" seems particularly accurate in light of the majority's peremptory challenge analysis. *See ante* at 10-12 (finding judicial involvement in peremptory challenges constitutes state action because Congress establishes jury qualifications, judges determine the order in which parties exercise peremptory challenges, and judges have discretion whether to excuse a juror for cause).

man's proposed sale of goods entrusted to him for storage, as permitted by the New York Uniform Commercial Code, was state action. The plaintiffs argued that state action existed because the State had authorized and encouraged the sale by enacting the Uniform Commercial Code. The Court found no state action, holding that the fourteenth amendment was inapplicable where plaintiffs characterize the state's inaction as "authorization" or "encouragement." *Id.* at 164-65.

In the present case, the Dunhams contend that the trial judge's failure to inquire into the reasons for a private litigant's exercise of a peremptory challenge constitutes state action. Thus the Dunhams' argument is not different from that advanced in *Flagg Bros.*: state action is present because the legislature encouraged the peremptory challenge by statutorily determining that civil litigants each receive three peremptories, and the court authorized these challenges even after the court received an objection. However, as in *Flagg Bros.*, a court's acquiescence in accepting the peremptory challenge does not convert private action into state action. Like the warehouseman's decision to sell the goods in his possession, a private litigant's decision to use a peremptory challenge is not properly attributable to the state. *Cf. Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (state's involvement in the mere running of a general staute of limitation generally insufficient to implicate due process).

In analogizing the judge's role in the peremptory challenge to *Shelley*, the majority overlooks *Evans v. Abney*, 396 U.S. 435 (1969), a case that is factually much closer to our case than *Shelley*. In *Evans*, a park was conveyed to a city for the exclusive use of white citizens. After the Supreme Court of the United States determined that the city could not operate the park in a racially discriminatory manner,[14] the state supreme court held that under state law the park reverted to the testator's

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[14] *See Evans v. Newton*, 382 U.S. 296 (1966).

heirs. Several black citizens who had originally attempted to integrate the park brought suit, alleging that the termination of the trust violated their right to equal protection. *Id.* at 437. The Supreme Court of the United States upheld the state supreme court's decision. The Court reasoned that there was not the slightest indication that the judges were motivated by racial animus in construing the will, and that the racial restrictions were solely the product of a private choice. Moreover, both blacks and whites equally shared the loss of the park.

> Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent . . . and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Id. at 446.

The role of the trial judge in the exercise of a peremptory challenge is much like that described in *Evans*. There is not the slightest indication that judges are motivated by racial animus when they excuse a juror after a peremptory challenge. Any racial motivation underlying the private litigant's peremptory challenge is solely the product of a private choice. Judges simply discharge jurors because of the neutral, nondiscriminatory statute providing that private litigants receive peremptory challenges. Clearly, the factual similarities and reasoning of the Court in *Evans* provide a compelling argument that there is no state action when a judge excuses a juror after a peremptory challenge.

The majority next looks to *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), in its quest for the elusive "something more." *See Lugar*, 457 U.S. at 937. In *Burton*, the Court found state action present when a

privately owned restaurant in a state-owned parking garage refused to serve blacks. The Court focused on several factors to determine the "nonobvious involvement of the State" in this case. *Id.* at 722. First, the Wilmington Parking Authority (the Authority) completed construction of the premises without cost to the restaurant. Second, the lease contained no requirement that the restaurant serve the public on a nondiscriminatory basis, despite the Authority's power to adopt such rules. Third, the profits earned from the restaurant's discrimination were indispensable elements in the financial success of the Authority's parking garage. *Id.* at 719-24. The Court thus concluded that "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity . . . ." *Id.* at 725.

To find that the Court's state action determination in *Burton* is relevant to whether state action is present when a private litigant exercises a peremptory challenge is to ignore *Burton's* command: " 'Differences in circumstances . . . beget appropriate differences in law.' " *Id.* at 726 (quoting *Whitney v. Tax Comm'n*, 309 U.S. 530, 532 (1939)). The trial judge cannot seriously be characterized as one who has so insinuated himself into a position of interdependence that he must be considered a joint participant with the private litigant in the exercise of a peremptory challenge.[15] In light of the "necessarily fact-bound inquiry" that confronts a court when

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[15] In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1971), the Court further developed the reasoning underlying *Burton*. The Court characterized *Burton* as dependent upon the "symbiotic relationship between lessor and lessee[,] . . . where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary purpose of furnishing parking space by advantageously leasing portions of the building . . . to [the restaurant]." No such symbiotic relationship exists when a private litigant exercises a peremptory challenge.

testing for state action, *Burton* is inapplicable to our case.

The majority's final stop in its quest for "something more" is *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). In *Tulsa*, the Court examined the activities of a probate court in administering a provision of the Oklahoma Probate Code that barred creditor claims against an estate unless those claims were presented to the estate within two months after the estate notified creditors that probate proceedings had commenced. A creditor who had failed to file a timely claim contended that the estate's use of publication notice, instead of personal notice, to creditors did not comply with the due process clause. *Id.* at 1341-43.

In determining whether sufficient state action was present to render the fourteenth amendment applicable, the Court determined that the probate court was intimately involved in the notification and probate process. The following factors were relevant to the Court's finding of state action: the court sets a hearing date after the initiation of the probate petition; the court mails notice of the hearing to all devisees, legatees, and heirs; the court has the discretion whether to admit the will to probate if no person contests the will at the hearing; after admitting the will to probate, the court appoints an executor; the court's appointment of the executor activated the two month filing period; the court issues an order *expressly compelling* the executor to give immediate notice to creditors. *Id.* at 1342-45. The Court stated that "[p]rivate use of state sanctioned private remedies or procedures does not rise to the level of state action. . . . But when private parties make use of state procedures with the *overt, significant* assistance of state officials, state action may be found." *Id.* at 1345 (citations omitted) (emphasis supplied).

The acquiescence of the trial judge in a private litigant's exercise of a peremptory challenge is fundamen-

tally—indeed qualitatively—different from the probate court's "overt, significant" involvement in every step of the probate process[16] and, most importantly, its direct order to the executrix to give notice to the creditors in accordance with the terms of the statute. In *Tulsa*, the Supreme Court fairly characterized as state action the joint action of the probate court and its appointed executrix, an officer of the court, to proceed with the probate of the estate by requiring creditors to give notice within a designated time period. It is well-established that such substantial joint action by private and state actors can constitute state action. *See Lugar v. Edmondson Oil*, 457 U.S. 922 (1982); *Snidack v. North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Snidack v. Family Fin. Corp.*, 395 U.S. 337 (1969). The key distinction overlooked by the panel majority is the difference between "joint action," in which the state actor affirmatively and substantially supports the private actor, and "interaction," in which state and private actors are present on the scene but where "the admittedly discriminatory policy [may not] in any way be ascribed to a governmental decision." *Lugar*, 457 U.S. at 937-38 (footnote omitted). In making this distinction, it is impor-

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[16] The fundamental difference is illustrated by a comparison between these procedures. The probate court has discretion whether to admit the will to probate; the trial judge has no discretion to refuse a peremptory challenge. The probate court takes an active role in the process by appointing the executor; the trial judge merely excuses a struck juror. The probate court's appointment of an executor has the legal significance of beginning the two month period in which claims against the estate must be filed; the trial judge commits no act with any legal significance by excusing a juror. The probate court in *Tulsa* routinely issued orders to compel the executor to give notice to creditors; the trial judge issues no order of any kind when a private litigant exercises a peremptory challenge. In short, the probate court's active control permeated the entire probate proceeding at every procedural step; the trial judge has a minimal role in the exercise of a peremptory challenge.

tant to keep in mind the Supreme Court's emphatic insistence that "*the conduct allegedly causing* the deprivation of a federal right be fairly attributable to the State." *Lugar*, 457 U.S. at 937. This focus on the specific activity allegedly causing the constitutional injury is evident in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). There, the Court examined whether the state's licensing and regulation of private utilities was state action sufficient to render the utilities' decision to terminate electrical service without notice or a hearing to the consumer subject to a section 1983 claim. The Court stated that "[a]pproval by a state utility commission of [a request to approve the utilities' practices] from a regulated utility, *where the commission has not put its own weight on the side of the proposed practice by ordering it*, does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" *Id.* at 357 (emphasis supplied). The Court concluded that the commission's approval, at most, "amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired." *Id.*

The trial judge, like the utility commission, does no more than determine that the private litigant is entitled to employ his peremptory challenges if he so desires. Private litigants make the decision whether to exercise a peremptory challenge. Although the utility was subject to heavy state regulation in *Jackson*, the Court found this an insufficient basis for finding state action. *Id.* Similarly, the trial court's limited regulation of the peremptory challenge process, *see ante* at 10-12 (trial judge controls voir dire, has discretion whether to excuse juror for cause, and determines order in which parties exercise their peremptory challenges), should not establish state action. *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1971) (refusing to find state action where state regulation did not foster or encourage discrimination); *Rendell-Baker v. Kohn*, 457 U.S.

830, 840-43 (1982) (finding no state action where decision to discharge teacher at publicly funded and regulated school was not compelled or influenced by any state regulation).

Careful analysis therefore reveals that the acquiescence of a judge when private litigants exercise peremptory challenges is fundamentally different from the state action established in *Shelley*, *Burton*, or *Tulsa*. A common thread runs through each of these cases: the state in some way played an *active*, *affirmative role* in the specific private conduct that the plaintiff alleged to be unconstitutional. In *Shelley*, the court was asked to enforce a facially discriminatory covenant that would have required the court, supported by the full panoply of state power, to take affirmative steps to remove the Shelleys from their home. In *Burton*, the state-owned garage was financially dependent upon the profits received from a state-built restaurant that discriminated against black customers. In *Tulsa*, the probate court appointed the executor and issued an order requiring that notice be given to creditors. The trial judge plays no such role in the peremptory challenge process. As the Supreme Court said in *Moose Lodge*, 407 U.S. at 173,

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of constitutional prohibition.

Conclusion

The majority finds state action where it previously has never been found. Such a radical transformation of the state action doctrine, necessarily requiring the death of the peremptory challenge and subjecting every element of civil trials to constitutional analysis, is both unprecedented and unwarranted. It is unsupported by the prevailing precedent of the Supreme Court and overrules, *sub silentio*, the established precedent of this circuit.[17] Accordingly, I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[17] The Seventh Circuit has refused to find state action in cases where the state was more involved in a process. In *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc), this court held that a private physician and private hospital do not act under color of state law when they commit a mentally disturbed person. In *Spencer*, the private physician's certification for commitment did not receive judicial review until after the patient had already been admitted to the hospital. The physician acted pursuant to a state adjudication procedure where the state had assumed express responsibility for the ultimate decision. Furthermore, the state of Illinois possessed the exclusive authority to hold a person against his will. In determining that no state action was present, this court focused on the private nature of the decision to commit a person. It noted that, despite the state involvement in authorizing or constraining the private activities, "the activities themselves remain private." *Id.* at 1381.

EXCERPT OF VOIR DIRE TRANSCRIPT FROM THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA

(April 24, 1989)

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[77] [THE COURT:] Is it Miss or Mrs. Mitchell?

MS. MITCHELL: Mrs.

THE COURT: Could you tell us something about yourself?

MS. MITCHELL: My name is Essie Mitchell. I reside in Gary, Indiana. I've lived there for 30 years. I am employed by Erbe's Beauty Salon (phonetically) as a licensed beautician.

MR. GALVIN: I couldn't hear Mrs. Mitchell's answer.

THE COURT: You lived in Gary? Could you speak up a little bit? How many years have you lived in Gary, ma'am?

MS. MITCHELL: 30 years.

THE COURT: Okay. And what is the name of the beauty salon?

MS. MITCHELL: Erbe's Beauty Salon.

THE COURT: And how long have you worked for that beauty salon?

MS. MITCHELL: About 20 years.

THE COURT: All right. And you are a licensed—

MS. MITCHELL: Cosmetologist, yes.

THE COURT: And we have already talked about that, I believe it was Mrs. Konhu. But after high school, what did you do to get your license?

[78] MS. MITCHELL: I had to go to school 20 months in Birmingham, Alabama.

THE COURT: And are you licensed by the State of Indiana?

MS. MITCHELL: Yes.

THE COURT: And when did you receive your license in Indiana?

MS. MITCHELL: 29 years ago.

THE COURT: Okay. And are you married or single, ma'am?

MS. MITCHELL: Married.

THE COURT: What is your husband's first name?

MS. MITCHELL: Jimmy.

THE COURT: And is he employed outside of the home?

MS. MITCHELL: Yes, Inland Steel.

THE COURT: And how long has he worked for Inland?

MS. MITCHELL: Approximately 25 years, 26, something like that.

THE COURT: And what is your husband's current job with Inland?

MS. MITCHELL: He is a utility man.

THE COURT: And does he work in a particular division or plant?

[79] MS. MITCHELL: Plant 2 is all I know.

THE COURT: When you say utility man, do you know whether or not he has anything to do with electrical machines or repairing any type of electric device?

MS. MITCHELL: I have no idea.

THE COURT: Mrs. Mitchell, do you understand the issues that will be presented to this jury and your role as a juror in this case?

MS. MITCHELL: Yes.

THE COURT: Do you have any questions or comments about the matters that I discussed with everyone else on the jury panel?

MS. MITCHELL: No.

THE COURT: Do you have any personal or business reason why you could not spend four or five days with us?

MS. MITCHELL: No. The—

THE COURT: You seem to hesitate.

MS. MITCHELL: Well, I am self-employed, but, you know, that's not an excuse. I said no.

THE COURT: Do you have anybody that covers for you?

MS. MITCHELL: No.

THE COURT: Are you the only one in your shop?

MS. MITCHELL: Oh, yes, there's other [80] beauticians, but everyone there has their own personal customers.

THE COURT: I see.

MS. MITCHELL: So that's what I mean.

THE COURT: If you do not work, you do not get paid, is that what you are saying?

MS. MITCHELL: Right.

THE COURT: And what are your normal working hours?

MS. MITCHELL: Oh, it varies, from Tuesdays I usually go in 10, stay until I finish. I just work four days a week and then, you know, different hours. We have no special hours.

THE COURT: Is it possible for you to make up some of your hours either evenings or Fridays if we get done or Saturday of this week?

MS. MITCHELL: It's possible to make up some of them, yes.

THE COURT: Would your concern for your loss of work in any way affect your ability to be fair and impartial in this case or distract your attention from the proceedings here?

MS. MITCHELL: No.

THE COURT: Now, although you said you are self-employed, you work for a business?

[81] MS. MITCHELL: I rent a booth in that salon.

THE COURT: And how many ladies, how many beauticians are in this particular salon?

MS. MITCHELL: I think it's eight.

THE COURT: Okay. Are you aware of anyone being injured in your salon?

MS. MITCHELL: No.

THE COURT: Are you aware of any charges of any type being made against your business?

MS. MITCHELL: Yes. I take that back, yes.

THE COURT: When was that?

MS. MITCHELL: A lady did file a suit against, as a matter of fact, two. One lady injured her hand in the door as she was going out, had filed a claim against my previous boss. See, his sons have the business now. But this was filed against the father. And then a thing from the ceiling fell and hit a lady. She filed a claim against them also.

THE COURT: Okay. Let's talk about the claim involving the hand injury. Did you have to testify?

MS. MITCHELL: No.

THE COURT: Are you aware of whether the case was resolved or did it have to go to trial?

MS. MITCHELL: It did not go to trial. I don't know what happened. I know it did not go to court.

[82] THE COURT: What about the tile or whatever, tiles from the ceiling?

MS. MITCHELL: No, neither one of them went to trial, you know. They did file a claim against them. I think it was handled through the insurance company.

THE COURT: Is there anything about either of those experiences that would affect your ability to be fair and impartial in this case?

MS. MITCHELL: No.

THE COURT: Now, I read off a long list of questions, Mrs. Mitchell. Would you have had to answer yes to any of those questions?

MS. MITCHELL: I did file a claim against the insurance company, I was hit from the rear as I was sitting at a light.

THE COURT: Traffic accident?

MS. MITCHELL: Traffic accident.

THE COURT: Did you receive personal injuries in the accident or was it just for the damage to your car?

MS. MITCHELL: No, personal injuries also.

THE COURT: What type of injuries did you receive?

MS. MITCHELL: I had a whiplash. He hit me from the rear.

THE COURT: And how long ago was that?

[83] MS. MITCHELL: That was back, '72, '71, '72.

THE COURT: Did you have an attorney or did you file the matter yourself?

MS. MITCHELL: Just filed a claim against the company.

THE COURT: Was that resolved to your satisfaction?

MS. MITCHELL: Yes.

THE COURT: Is there anything about that experience that would affect your ability to be fair and impartial?

MS. MITCHELL: No.

THE COURT: Did the insurance company have an attorney?

MS. MITCHELL: No, with me. I just talked with the claims adjuster, settled it like that.

THE COURT: You never filed a case with a court then?

MS. MITCHELL: No, not the courts, no, just with the insurance.

THE COURT: Did you resolve the case with the insurance company to your satisfaction?

MS. MITCHELL: Yes.

THE COURT: Any other question on that list that you would have had to answer yes to?

[84] MS. MITCHELL: Yes, you asked about organizations. I am a member of the Grand Unit Order of Our Fellows in the Household Rule. And I serve as the district recorder in that organization.

THE COURT: And how long have you been a member of that organization?

MS. MITCHELL: Oh, since '71.

THE COURT: And do you regularly attend meetings?

MS. MITCHELL: Yes. I also serve as a supervisor in my district and on the state, I am a working recorder.

THE COURT: So you are active in that organization?

MS. MITCHELL: Very active.

THE COURT: Is that the only fraternal or social organization that you are a member of?

MS. MITCHELL: Yes.

THE COURT: Okay. Any other question on that list that you would have had to answer yes to?

MS. MITCHELL: No.

THE COURT: You do not know any of the witnesses?

MS. MITCHELL: No. I never—not personally. I heard of their names. And I do know Tommie and Lorenzo Cockrell, but not no personal level, anything like that.

[85] THE COURT: How do you know Tommie and Lorenzo Cockrell?

MS. MITCHELL: He used to date one of my coworkers.

THE COURT: When you say he—

MS. MITCHELL: That was years ago.

THE COURT: Lorenzo?

MS. MITCHELL: Yes.

MR. CLEMENTS: Your Honor, they won't be witnesses. They are not going to be called as witnesses.

THE COURT: Do you know any other witnesses then if those two are not going to be called?

MS. MITCHELL: Huh-uh.

THE COURT: You have to answer out loud for the reporter, please, ma'am.

MS. MITCHELL: No. I'm sorry.

THE COURT: Anything else on that list of questions that I read off that you would have had to answer yes to?

MS. MITCHELL: No.

THE COURT: Can you think of any reason why you should not be selected to serve on this jury, ma'am?

MS. MITCHELL: No.

THE COURT: Do you believe you can be fair and [86] impartial to both sides?

MS. MITCHELL: Yes.

THE COURT: Okay, thank you, Mrs. Mitchell.

MS. MITCHELL: Yes.

THE COURT: If the attorneys want to take a few minutes to consider Mr. Semple and Mrs. Mitchell.

Are the attorneys ready to proceed?

(The following proceedings were had outside the presence of the prospective jurors.)

THE COURT: Okay. Three for the Plaintiff then and one for the Defendant.

MR. RUMAN: Judge, they struck who?

THE COURT: You struck Mr. Semple and Defendant struck Mrs. Mitchell.

MR. RUMAN: Your Honor, at this time, we would like to make an objection for the record that the only black person called on the jury is being struck and that is a racially motivated striking and it doesn't give our client a fair cross-section of our community which is probably in Lake County half black, if there is not a black on the jury.

THE COURT: Show the objection as being overruled.

And Batson has not been applied to [87] civil cases by either the United States Supreme Court and the Seventh Circuit. I am not going to apply it in a civil case. But your objection is of record.

MR. RUMAN: We could start in this court, your Honor.

(The following proceedings were had in the presence of the prospective jurors.)

THE COURT: Mr. Semple and Mrs. Mitchell, you have been excused. Thank you for coming in.

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1365

FRANK'S NURSERY & CRAFTS, INC.,

Petitioner,

v.

MARTHA DUNHAM AND PRESTON DUNHAM,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh District

RESPONDENTS' MOTION SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI PURSUANT TO ORDER OF THE SUPREME COURT

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Comes now the Respondents, Martha Dunham and Preston Dunham, and for their Answer to the Petition for Writ of Certiorari, pursuant to the Supreme Court's Order, allege as follows:

1. The issue raised in the Petition

for a Writ of Certiorari is the applicability of the holding in Batson v. Kentucky, 476 U.S. 79, 106 S.C. 1712 (1986), that a peremptory challenge may not be used to strike jurors based solely upon racial discrimination. The Batson case held that a prosecutor in a criminal case using a peremptory challenge to strike a juror solely for racial reasons violates equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. In the case at bar, the Seventh Circuit held that in a civil case with a black plaintiff, the defense using a peremptory challenge to strike a black juror solely upon racial grounds would be state action and a violation of equal protection guaranteed by the Fourteenth Amendment to the United States

Constitution.

3. Respondents understand the question concerning peremptory challenges based upon race in civil cases may be answered when the Supreme Court rules on the case of Edmonson v. Leesville Concrete Co., Inc., 895 F.2d 218 (5th Cir. 1990), which held that use of a peremptory, discriminatory challenge in a civil case was constitutional, and which has been argued before the Supreme Court.

4. Respondents urge the Supreme Court to accept Certiorari in this case and consider the well-reasoned decision of the Seventh Circuit in the Dunham case in its holding that the peremptory, discriminatory challenge of a juror would be unconstitutional.

5. Respondents urge the Supreme

Court to accept Certiorari so that it will have the advantage of Dunham and the decision of the Seventh Circuit before it in deciding the issue raised by Edmonson and Dunham.

WHEREFORE, Respondents respectfully request the Supreme Court to accept Certiorari of this cause and affirm the Judgment of the Seventh Circuit Court in Dunham, as well as for all other relief just and proper in the premises.

Respectfully submitted,

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Dated: May 10, 1991